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In the

Supreme Court of the United States

OCTOBER TERM 196[redacted]

No. [redacted] 149

IN THE MATTER OF THE ADOPTION OF MOLLY PAGE ARMSTRONG, A MINOR

R. WRIGHT ARMSTRONG JR.,

Petitioner,

v.

SALVATORE E. MANZO et ux,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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R. WRIGHT ARMSTRONG JR.,

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SALVATORE E. MANZO et ux,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

Salvatore E. Manzo and wife, Alice Flournoy Davis Manzo, Respondents, respectfully urge that the petition for writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas be denied.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case", in matters relevant to the petition, is correct.

REASONS FOR DENYING THE PETITION

A. Petitioner Was Given a Full Hearing on the Question of the Adoption.

On the day the original decree was entered in the Trial Court, April 27, 1962, Respondent Salvatore E. Manzo wrote Petitioner's father that the adoption had been decreed (Statement of Facts, page 41, letter, exhibit R-2). Petitioner was residing with his father at the time (S. F. depositions of Petitioner, p. 3, and of his father, p. 49). Thereafter, on May 7, 1962, Petitioner's original motion for new trial was filed. On May 25, 1962 Petitioner filed his "Amended Motion for New Trial and Motion to Vacate Judgment". The Trial Court set a hearing for June 14, 1962. On Petitioner's application for continuance, the hearing was re-set for June 22, 1962. The parties, by stipulation of counsel, took oral depositions of four witnesses in Ft. Worth, Texas, being the depositions of Mr. Irby and Dr. Kelly on June 14, 1962, and of Petitioner and Petitioner's father on June 16, 1962.

On June 22, 1962, the hearing was held, and Petitioner introduced testimony from five witnesses, introduced exhibits, and offered testimony from the four depositions which had been taken.

On June 29, 1962 the Trial Court confirmed the decree of adoption, and Petitioner gave his notice of

appeal. On July 10, 1962 Petitioner filed his request for findings of fact and conclusions of law, and on July 16, 1962 the Trial Court filed such findings and conclusions.

Thus, from the foregoing, and the 136 pages of testimony plus a total of 112 pages of deposition testimony, it is apparent that Petitioner was accorded a full hearing on the adoption. Further, Petitioner was given ample time to take depositions in Ft. Worth, attended by the attorney who tried the case for Petitioner in the Trial Court and the Texas appellate courts; to continue the hearing to a later date; and to bring witnesses to El Paso from Ft. Worth (Father Leatherbury, S.F., p. 31; Mr. Armstrong, Sr., S.F., p. 36), a distance of more than five hundred miles. Petitioner made no complaint that other testimony was available to him or that more time was needed, and Petitioner proceeded with the putting on of testimony without complaint that he assumed the burden of proceeding (S.F., p. 2). Petitioner closed without complaint that time had been inadequate for the presentation of his case (S.F., p. 133 and p. 136). Petitioner enjoyed due process of law and procedure for his opportunity to present his case to the Trial Court and the Texas appellate courts, and suffered no denial of Constitutional protection.

B. The Texas Adoption Statutes, as Interpreted by the Texas Courts, Require a Full Hearing for the Parent.

The Supreme Court of the United States accepts the construction placed by the state court on the state statute under consideration. *Morehead* v. *New York*, 298 U.S. 587 (1936).

The state court rulings in Texas have held that the parent's consent to adoption is not required where there has been a failure to support, under Article 46a, Revised Civil Statutes of Texas, but that the parent must be allowed a full hearing in subsequent proceedings on the issue of whether sufficient facts existed as to authorize the entry of the judgment of adoption. *Lee* v. *Purvin,* 285 S. W. 2 405, 410 (Tex. Civ. App., 1955, writ of error refused, no reversible error); *Johnston* v. *Chapman,* 279 S.W. 2 597, 599 (Tex. Civ. App., 1955, writ ref., n.r.e.); *Pettit* v. *Engelking,* 260 S.W. 2 613, (Tex. Civ. App., 1953, writ ref., n.r.e.). A judgment of adoption is not final as to the parent until such hearing is held, nor does statutory limitation apply as to the right to have such a hearing. *Johnston* v. *Chapman,* page 599.

Here, Petitioner was granted his full hearing, not in a "subsequent proceeding" but in the same proceeding, and the holding on the appeal was in the line of Texas authority cited above. Express reliance was made by the Court of Civil Appeals on *Lee* v. *Purvin,* and the effect of the holding by the Court of Civil Appeals is that Petitioner's consent was not necessary for the adoption since there had been a failure to support, but Petitioner had been given a full hearing on the subject. *In re Adoption of Armstrong,* 371 S.W. 2 407, 412 (Tex. Civ. App., 1963, writ ref., n.r.e.), appendix A, petition for writ of certiorari.

The procedure in Texas, therefore, allows the parent a full hearing, and Petitioner was allowed a full hearing in the same proceeding in which the adoption was decreed. Petitioner suffered no deprivation of due

process on law in this, and the Texas statutes, as interpreted by the Texas courts and as applied in this case, cause no deprivation of due process.

C. *Petitioner's Real Complaint is that He Was Found to Have Failed to Support the Child.*

Petitioner was accorded a full hearing, as allowed by the interpretation of the Texas statutes, and never since has cited any evidence he would have presented in a different hearing. His real complaint is not that he was denied a fair hearing, but that the Trial Judge ruled against him and the Court of Civil Appeals held:

> We feel that, from the record, the conclusion is inescapable that the appellant failed to contribute substantially to the support of his child for a two-year period prior to the filing of the petition for adoption commensurate with his financial ability, and the trial court so found in his Conclusions of Law.

In re Adoption of Armstrong, 371 S.W.2 407, 410 (Tex. Civ. App., 1963, writ ref., n.r.e.).

D. The Texas Statutes and Holdings, and Their Application in this Case, Do not Violate Due Process of Law, Since Opportunity for Hearing Appropriate to the Nature of the Case is Allowed.

In the nature of such a case as this, where a child has not been provided support by a parent for two years,

a statute may allow adoption without consent, and the "full hearing" required by the cited Texas cases is appropriate to the nature of the case. "Opportunity for hearing appropriate to the nature of the case" is the requirement of due process. *Mullane* v. *Central Hanover Bank,* 339 U.S. 306, 313 (1949). Petitioner was given his full hearing, and only after such hearing did the judgment become final.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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This is to certify that on the 29 day of June, 1964, a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served upon counsel for Petitioner by depositing copies thereof in the United States mail, certified return receipt requested, addressed to Mr. Ewell Lee Smith, Jr., 1100 Adolphus Tower, Dallas, Texas.

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